D.B. CIVIL MISC. APPEAL NO. 193/2005.

UNION OF INDIA VS BHILWARA SPINNING LTD. AND ANR.

DATE OF ORDER : 05.08.2005.

HON'BLE MR. RAJESH BALIA,J.
HON'BLE MR. R.S. CHAUHAN, J.

Mr. Vineet Mathur for the appellant – Union of India.
Mr. Arun Bhansali for the respondents.

We have heard learned counsel for the parties.

In this appeal, at the instance of the Revenue, following substantial question of law was framed at the time of admission:

> "Whether the Modvat Credit is available to the assessee on the quantity of HFO short received in the factory and the same was not used in the manufacture of final product and also the assessee was liable for penalty under section 11AC of the Central Excise Act, 1944 for the excess availment of Modvat/Cenvat credit during the period after 01.04.2000."

The short controversy that arises in this case is that the respondent – assessee was in receipt of consignment of HFO in his factory from the importer under

relevant invoice evidencing the payment of Counter Vailing Duty on the goods consigned under that invoice by the importer. The respondent – assessee was entitled to avail modvat credit on that basis.

The facts which are further necessary for present purposes are that the assessee had received in factory the consignment as a whole directly, but actual quantity of HFO was marginally less than the actual quantity stated in invoice resulting in normal loss on account of transit operation. The assessee has availed the modvat credit on the basis of Counter Vailing Duty paid on the goods received by him as per invoice. The payment was evidenced by the invoices. However, the Assistant Commissioner pointed out that to the extent the lesser quantity of HFO was received in the factory, the assessee is not entitled to avail modvat credit on such short receipt of the HFO and directed withdrawal of modvat credit to that extent.

The short receipt in the factory premises was found to be less than ½ % of the total quantity which according to the fact finding authority was due to normal transit loss.

The Commissioner Excise (Appeals) as well as the Tribunal vide orders dated 5.5.03 and 22.1.04 respectively were of the opinion that the assessee is entitled to avail full modvat credit on the basis of CVD paid on inputs received by him in factory as evidenced by the invoices, but the marginal loss of goods in transit as a result of normal evaporation and transit loss cannot be taken note of for the purposes of reducing the modvat credit. Since the availing of modvat credit was found to be in order, the penalty levied by Assessing Officer for availing of modvat credit more than entitlement, was also set aside.

It is contended by the learned counsel for the Revenue that modvat credit is available on the inputs used and therefore, the actual quantity consigned under the invoices is not relevant consideration. Learned counsel for the respondent – assessee on the other hand has urged that in the facts and circumstances, there being no case of diversion of the goods from the place of commencement of journey until the place of receipt in the factory and full utilisation of the quantity of input received in the factory for the purposes of manufacturing the end product, the assessee on the basis of CVD paid by the importer on such

goods as per invoice is eligible for availing modvat credit. It was also urged that in the facts and circumstances, the entire CVD was paid in respect of the quantity of goods received by the assessee in his factory and utilised by him and not on any other part of the commodity.

Having considered the rival contentions, we are inclined to agree with the view taken by the Tribunal that in the facts and circumstances, when it is not in dispute that there is no diversion of the goods covered under the invoices in question and entire goods received under consignment has not been put to any use other than as input in the end product manufactured by the assessee and the transit loss was found by the Tribunal to be normal loss due to evaporation, it must be held that the CVD paid by the consigner/ importer was paid in respect of the goods entire used by the assessee as inputs in the manufacture of end product.

Moreover, Rule 57(9) envisages that such amount of modvat credit availed by the assessee, which is evidenced by the invoices, has inherent co-relation with the payment of duty with goods covered by such invoices.

Where the CVD, Customs or Excise duty on the inputs received by the assessee in the factory and used by him in manufacturing of end product has corelation with the evidence of the payment about the duty on the entire goods received and used in the factory, no curtailment of modvat credit as evidenced by the invoices is permissible. The mode of proof of quantity and payment of duty on inputs received and used as input is by producing the invoices. Unless the invoices are found to be wrong or diversion of inputs received under invoice to any other use is found, there is no provision to avail lesser modvat credit than what has been proved to have been paid on the entire goods received and used in factory of manufacturer.

The conclusion reached by the Tribunal is, therefore, justified and does not call for any interference.

Since we have held that the modvat credit has rightly been availed by the assessee, the question of penalty for over availment of modvat credit also would not arise. We, therefore, are not adverting to the alternative ground that even if modvat credit has wrongly been availed on the part of goods received, still there being no deliberate attempt on the part of the assessee to avail

such extra modvat credit penalty cannot be levied as a matter of course.

The appeal is accordingly dismissed. No order as to costs.

(R.S. CHAUHAN)J. **(RAJESH BALIA)J.**

Anil/